# TOPIC 2: RELEVANCE

## Introduction

- In order to be admissible, evidence must be directly or indirectly relevant to a fact in issue
  - Notwithstanding relevance, evidence may still be excluded
  - Fundamental rule of the law of evidence
- All other Ch 3 rules are exceptions to this main rule of admissibility
  - Ss 135-137
- S 55(1): Defines 'relevance' → Test
  - Evidence is relevant if it is '*evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'*
  - Requires a minimal logical connection between the evidence and a 'fact in issue'
  - Test is of 'logical relevance', objective
  - Eg. *R v Stephenson:* S's culpable driving killing three people in the other car, S argued BAC of the victim's was relevant
    - Held: Driver of other car was unknown, so BAC wasn't relevant even if they were all over the limit
- S 56: If evidence isn't relevant, it's not admissible in a proceeding
  - If relevant, evidence is admissible, unless excluded by an exclusionary rule (eg. Exercise of judicial discretion)

*Smith v R* (2001) 206 CLR 650

- S was convicted of robbery, and it was video recorded and available for jury to observe
  - Issue was whether S was in the photos
  - Police gave evidence they knew S and recognised him as the person in the photos
  - Issue: Was this evidence properly admitted?
- Gleeson CJ, Gaudron, Gummow & Hayne JJ: The police's assertion that he recognised S isn't evidence that could rationally affect the assessment by the jury of the question we have identified
  - The fact that someone else can identify the accused in the picture doesn't provide any logical basis for affecting the jury's assessment of the fact
  - *'In this case the evidence of the police was irrelevant and shouldn't have been received'*
- In other cases, the evidence may be relevant
  - Eg. Identifying someone whose appearance differs significantly

## Circumstantial Evidence

- Unlike direct evidence
  - Eg, opportunity and capacity
- Is the circumstance a link in the chain, or just a strand in the cable

*Plomp v R* (1963) 110 CLR 234

- P accused and convicted of willful murder of his wife
  - P gave sworn evidence that she was drowned while they were surfing at dusk
  - Evidence indicated no danger in the surf, and wife was a good swimmer
- *'It was proved that P had formed a liaison with another woman whom he had promised to marry, that he had represented himself as a widower and that he was continuing the liaison. In the circumstances, proved by apparently credible evidence, it was open to conclude that P had the strongest reasons to be rid of his wife. It is unnecessary to traverse all the circumstances in detail.'*
- P argued in application for special leave to appeal that his motives shouldn't have been considered by the jury until it was shown that his actions were responsible for his wife's death
- Held: If the jury weighed all the circumstances they might reasonably conclude that it would put an incredible strain on human experience if P's evident desire to get rid of his wife at that

particular juncture, presaged as it was by his talk and actions, were fulfilled by her completely fortuitous death although a good swimmer and in circumstances which ought not to have involved any danger to her

*Chamberlain v R (No 2)* (1984) 153 CLR 521

- Husband and wife convicted of murdering infant daughter whilst camping – wholly circumstantial case
- Test for the jury: Where a jury is required to draw an inference from the circumstances of the case, the circumstances must be established beyond reasonable doubt
    - The jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and they could draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference

*Shepherd v R* (1990) 170 CLR 234

- S convicted of conspiring to import heroin, with three groups of evidence:
    - Two undercover policemen in a cell with the accused after arrest – admissions
    - Evidence of persons involved in the operation – given immunity from prosecution
    - Evidence of financial transactions said to indicate S shared the profits with co-accused
- Had to consider whether each piece of evidence directly pointed to guilt, or indirectly pointed to guilty (circumstances from which guilt may be inferred)
- Dawson J: '*Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence'*
- Interpreted *Chamberlain*
    - Held its not authority for the proposition that, in cases based on circumstantial evidence, juries must be directed that they cannot use a fact as a basis for inferring guilt unless that fact was proved beyond reasonable doubt
- Ordinarily, guilt must be proven beyond reasonable doubt by looking at all of the circumstances collectively
    - However, any 'indispensible links' in the jury's reasoning process must be proven beyond reasonable doubt
    - On the facts, the evidence falling within the third category did not meet this standard

*R v Dupas* [2001] VSCA 109

- D killed a victim by stabbing with distinctive wounds
    - Second and third victims found with same distinctive injuries
    - Expert evidence of the fact that these wounds were unusual
- Evidence was admissible

*Jury Directions Act*

S 61: What must be proved beyond reasonable doubt

Unless an enactment otherwise provides, the only matters that the trial judge may direct the jury must be proved beyond reasonable doubt are—

a) the elements of the offence charged or an alternative offence; and
b) the absence of any relevant defence.

S 62: Abolition of common law obligation to give certain directions

Any rule of common law under which a trial judge in a criminal trial is required to direct the jury that a matter, other than a matter referred to in section 61, must be proved beyond reasonable doubt is abolished

# TOPIC 3: COMPETENCE AND COMPELLABILITY

## Introduction

- CL position: Exclusion for those who were more likely to mislead than assist the tribunal by reason of their particular interest in the proceedings
    - S 26: Gives power general power to control the questioning of witnesses
- *Evidence Act* codifies relevant law in this area
- Competent witness: Witness who may give evidence
    - Test to determine whether a witness is competent to give evidence is based on their capacity to understand a question and give an answer that can be understood
    - S 13(3): Test for competence to give sworn evidence is whether a person has *'the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence'*
    - If the witness satisfies the test, they're competent to give evidence
    - If the witnesses doesn't satisfy the test, ss 13(4), (5), (8) provide relevant arrangements if the person isn't competent
- If a person doesn't satisfy s 13(3) they can give unsworn evidence provided the court tells the person the three things listed in s 13(5):
    - That it is important to tell the truth (a)
    - That he may be asked questions that he doesn't know, or can't remember, the answer to, and that he should tell the court if this occurs (b)
    - That he may be asked questions that suggest certain statements are true or untrue and that he should agree with the statements that he believes are true and should feel no pressure to agree with statements that he believes are untrue (c)
- Compellable witness: Witness who may be required by order of the court to give evidence

S 12: Competence and compellability

Except as otherwise provided by this Act-

(a) Every person is competent to give evidence; and

(b) A person who is competent to give evidence about a fact is compellable to give that evidence

**Oaths and Affirmations**

- Consider CL positions of witnesses who don't believe in a deity
- Now resolved by ss 21, 23
- Ss 23(3), 23(3), 24(2): Unsworn evidence
- S 24A: Alternative oath

*Evidence Act*

S 21: Sworn evidence of witnesses to be on oath or affirmation

1. A witness in a proceeding must either take an oath, or make an affirmation, before giving evidence
2. Subsection (1) does not apply to a person who gives unsworn evidence under section 13
3. A person who is called merely to produce a document or thing to the court need not take an oath or make an affirmation before doing so.
4. The witness is to take the oath, or make the affirmation, in accordance with the appropriate form in Schedule 1 or in a similar form.
5. Such an affirmation has the same effect for all purposes as an oath.

# TOPIC 5: THE EXAMINATION OF WITNESSES

## Introduction

- S 12: All persons are competent to testify and may be compelled to testify
- S 13: Certain persons lack the capacity to give sworn evidence
    - This provision allows young children and persons with a mental disability to testify through unsworn evidence even though they don't comprehend such concepts as 'obligation' → Still evidence
- S 28: Order is examination in chief, cross-examination and re-examination

## Examination in Chief

- Party who calls witness commences examination in chief:
    - First, counsel asks witness to state full name, occupation and address
    - Second, counsel leads witness through his leading evidence
    - Counsel's questions typically based on 'brief of evidence' obtained beforehand
- Counsel must:
    - Constantly remain conscious of the rules of evidence and avoid encroachments (eg. Stop witness giving hearsay evidence)
    - Generally ask open-ended questions
    - Avoid asking leading questions: s 37(1)
        - Leading question: Suggests a particular answer or assumes a disputed fact
        - Can ask leading questions in cross-examination
- Leading question dictionary definition: Question asked of a witness that –
    (a) directly or indirectly suggests a particular answer to the question; or
    (b) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked

**Exceptions to the prohibition against leading questions**

- Court gives leave to ask leading questions
- Leading question relates to introductory matter of witness's evidence
- No object by opposing counsel to the leading question
- Leading question relates to a matter not in dispute
- Leading question is directed to expert witness for a purpose of adducing expert opinion about hypothetical facts (eg. 'If bullets were found lodged in the wall, can you say how close the gun would have been to the deceased when it was fired?')

**Reasons for not allowing leading questions**

- Basis of adversarial system
- Witness called should be giving their own evidence
- Counsel eliciting desired response means it is arguably counsel's evidence, not the witnesses
- Anyone can answer leading questions without any memory or knowledge of the relevant facts and circumstances of the case
- Answers to leading questions are often worthless in terms of probative value

*Evidence Act* s 37: Leading questions

1. A leading question must not be put to a witness in examination in chief or in re-examination unless—
    a. the court **gives leave**; or
    b. the question relates to a **matter introductory** to the witness's evidence; or
    c. **no objection** is made to the question and (leaving aside the party conducting the examination in chief or re-examination) each other party to the proceeding is represented by an Australian legal practitioner or prosecutor; or
    d. the question relates to a matter that **is not in dispute**; or
    e. if the witness has **specialised knowledge** based on the witness's training, study or experience—the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given.
2. Unless the court otherwise directs, subsection (1) does not apply in civil proceedings to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties.
3. Subsection (1) does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

## Reviving Memory

- Most witnesses would have made a written statement at some point pre-trial
    - There is a general prohibition against a witness giving testimony by simply tendering or reading a document which is inadmissible in its own right
    - Usually in examination-in-chief
- Main issue: Whether events were 'fresh in the memory' when record was made
    - Record was 'contemporaneous' with the events simply supported that assertion
- Problems arise where witness seeks to refer to a record which:
    - Wasn't prepared by the witness (eg. Secretary took notes); or
    - It's not the original record of the events (eg. Transcribed into more formal record)

    → In such situations, witness will be permitted to refer to the record provided:
    - It's demonstration the witness had knowledge of and verified the contents of the original record when it was produced
    - The accuracy of any copy is properly verified
- *R v Van Beelen*: pathologist dictating to police officer regarding hair analysis
    - Series of revised type-written notes prepared by each of them
    - Pathologist not permitted to use police officer's revised version – court said had to refer to original notes

### When Evidence is Allowed to Refresh Memory

- Although a witness may not read from the document, the witness may be allowed to refer to it to refresh his/her memory, if:
    - Witness's memory is exhausted; and
    - Witness has made a contemporaneous record of the facts in question when they were fresh in the memory; and
        - Issue: Record must be 'contemporaneous' with the events
        - Issue: Whether events were 'fresh in the memory' when the record was made
    - Court's leave was sought
        - Court must grant leave to refresh memory
- <u>Trial judge must be satisfied:</u>

1. Witness indicates he cannot now recall the details of events because of the lapse of time since they took place
2. He made a statement much nearer the time of the events and that the contents of the statement represented his recollection at the time he made it